TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 240.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

JAMES TONSELLITO.

IN ERROR TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

FILED SEPTEMBER 8, 1915.

(24,908)

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a-361 New Jersey Court of Errors and Appeals, June Term, 1915.

On Appeal from Hudson Circuit Court.

Between JAMES TONSELLITO, Respondent,
vs.
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

Order on Affirmance of Judgment.

This cause having been duly argued at the March Term, 1915, of this court by Messrs. Vredenburgh, Wall & Carey, of counsel for the appellant, and Alexander Simpson, Esq., of counsel for the respondent, and the court having considered the same, and finding no error in the record or proceedings in the Circuit Court—

It is thereupon, on this Fourteenth day of June in the year of our Lord one thousand nine hundred and fifteen, ordered and adjudged that the judgment of the Hudson Circuit Court, removed by the appeal in this cause, be affirmed with costs; and that the record be remitted to the Hudson Circuit Court to be proceeded with in accordance with this judgment and the practice of said court.

On motion of

ALEX. SIMPSON,
Attorney for Respondent.

[Endorsed:] New Jersey Court of Errors and Appeals. June Term, 1915. James Tonsellito, Respondent, vs. The New York Central and Hudson River Railroad Company, Appellant. On Appeal from Circuit Court. Order Affirming Judgment. Alex. Simpson, Att'y. Filed Jun- 18, 1915. Thomas F. Martin, Clerk.

362 Supreme Court of the United States.

JAMES TONSELLITO, Plaintiff-Defendant in Error,
vs.
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Defendant-Plaintiff in Error.

Petition for Writ of Error.

To the Honorable the Justices of the Supreme Court of the United States:

The petition of The New York Central and Hudson River Railroad Company respectfully shows:

1. That the plaintiff in error is a railroad corporation of the State of New York, and, at the time of the occurrence complained of in this suit, was the lessee and operator of a railroad extending from

Weehawken, Hudson County, New Jersey, to Ravena, Albany County, New York, and beyond.

2. Defendant in error is the father of Michael Tonsellito, an infant, who was employed by plaintiff in error at the round-house in Granton Yard, near Weehawken aforesaid, and who was injured on June 23rd, 1912, while attempting to board an engine at a switch near the store-house in said yard.

3. The engine was in charge of Orr, a hostler, who was on his way from the round-house to the store-house, to procure a barrel of oil which was the property of the plaintiff in error, and which was to be carried to Ravena aforesaid, for the plaintiff in error.

363 4. Michael Tonsellito, the infant son of the Defendant in error, rode with Orr on the engine from the round-house on the way to the store-house. To reach that point it was necessary to travel some distance through the yard, switching back to the store-house. One McKee was riding on the pilot of the engine to turn the switch, but Michael left the engine without Orr's knowledge and essayed to turn it. As a result of the aforesaid accident, while attempting to board the engine, a portion of Michael's left foot was amputated.

5. Suit for damages under the Federal Employers' Liability Act was instituted in the Hudson County Circuit Court, in the State of New Jersey, for loss of Michael's services during the period of incapacity and during minority. Judgment was entered in favor of defendant in error for $1,000. This judgment was affirmed by the Court of Errors and Appeals of New Jersey, which is the court of last resort in said State, in all causes, and the highest court exercising civil jurisdiction.

6. There was no testimony in the case to show what was to be done with the oil when it reached Ravena, nor whether the barrel of oil was carried beyond Granton Yard. At the trial, plaintiff in error moved for nonsuit and a verdict in its favor, on the grounds that:

(1) Michael Tonsellito and defendant were not engaged in interstate commerce at the time of the injury complained of, and hence the court was without jurisdiction, the father's rights under the act being no greater than the son's.

(2) No negligence was shown on the part of the plaintiff in error.

(3) Michael assumed as a risk of his employment the danger incident to boarding the engine.

(4) No right of recovery is afforded the father under the Federal Act for injuries to an infant son, unless the injury result in death, and said Act supersedes all other rights of action.

364 Both motions were decided adversely to the plaintiff in error, and were therefore decisions against the right or immunity from suit to which plaintiff in error was entitled under the Federal Statute upon which the suit was based. The Court of Errors and Appeals decided against this right or immunity, in affirming the judgment below, in a proceeding in which was claimed by plaintiff in error a right, privilege or immunity, under a statute of the United States and which had been denied by the decision of the Hudson County Circuit Court, upon which statute said action was

based, which said decision of said Court of Errors and Appeals thus affirming the judgment of the Hudson County Circuit Court, is against such right, privilege or immunity.

Wherefore, your petitioner prays the allowance of a writ of error directed to the Court of Errors and Appeals of the State of New Jersey, in the last resort in all causes, being the possessor and custodian of the proceedings and judgment in this action, commanding that the said record and proceedings in said action be sent by said Court of Errors and Appeals of the State of New Jersey, to the Supreme Court of the United States, with all things concerning the same, and for citation, to the end that the errors complained of in the Assignment of Errors herewith filed by said petitioner, may be reviewed, and if error be found, that the same may be corrected conformably to the Constitution and Laws of the United States.

VREDENBURGH, WALL & CAREY,
Attorneys of Petitioner and Plaintiff in Error,
1 *Exchange Place, Jersey City, N. J.*
ALBERT C. WALL, *Of Counsel.*

365 STATE OF NEW YORK,
County of New York, ss:

Edward L. Rossiter, of full age, being duly sworn, on his oath deposes and says:

I am the Treasurer of the petitioner within named, and as such am familiar with the matters in said petition set forth. The foregoing petition is true to the best of my knowledge, information and belief.

E. L. ROSSITER.

Subscribed and sworn to before me this 5th day of August, A. D. 1915.

JAMES IRELAND,
Notary Public, New York County.

Cert. filed in Bronx & West. Cos.; Bronx Co. No. 1; Bronx Reg. No. 703.

[Seal James Ireland, Notary Public, New York County.]

O. K.
J. I.

Read on application for writ of error this 12th day of August, A. D. 1915.

MAHLON PITNEY,
Associate Justice of the Supreme Court of the United States.

366 [Endorsed:] 3199. Supreme Court of the United States. James Tonsellito, Plaintiff-Defendant in Error, vs. The New

York Central and Hudson River Railroad Company, Defendant-Plaintiff in Error. Petition for Writ of Error. Vredenburgh, Wall & Carey, Attorneys for Plaintiff in Error, 1 Exchange Place, Jersey City, N. J. Filed Aug. 14, 1915. Thomas F. Martin, Clerk.

367 Know all men by these presents, that the undersigned, The New York Central Railroad Company, successor to The New York Central and Hudson River Railroad Company, a corporation organized under the laws of the State of New York, as principal, and The Nation Surety Company of New York, a corporation authorized to do business in the State of New Jersey, as surety, are held and firmly bound unto James Tonsellito, in the just and full sum of five hundred dollars ($500), to be paid to the said James Tonsellito, his certain attorneys, heirs, executors, administrators or assigns, to which payment well and truly to be made, said corporations bind themselves, their successors, representatives and assigns, jointly and severally by these presents.

Whereas, lately in the Court of Errors and Appeals, in the last resort in all causes in the State of New Jersey, in a suit pending in said Court, between James Tonsellito, plaintiff-appellee, and The New York Central and Hudson River Railroad Company, defendant-appellant, judgment was rendered against said New York Central and Hudson River Railroad Company and in favor of said Plaintiff-appellee, affirming a judgment of the Circuit Court of Hudson County in the State of New Jersey, entered in said Circuit Court in favor of said James Tonsellito and against said New York Central and Hudson River Railroad Company, which Company being about to apply for a writ of error to the Supreme Court of the United States to reverse the judgment in said suit and for the issuing of a citation directed to said James Tonsellito, citing and admonishing him to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington in the District of Columbia,

368 Now, therefore, the condition of the above obligation is such that if said New York Central and Hudson River Railroad Company shall prosecute its writ to effect and answer all damages and costs, if it fail to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed with the seals of said corporations and dated this fifth of August, 1915.

NEW YORK CENTRAL RAILROAD COMPANY, SUCCESSOR TO NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

[SEAL.] By A. H. SMITH, *President.*

Form approved.
A. S. C.

Attest:
E. F. STEPHENSON,
Ass't Secty.

THE NATIONAL SURETY COMPANY
OF NEW YORK,
By FRANK W. STUCKY,
Res. Vice-President.

Attest:
M. O'LEARY,
Resident Assistant Secretary. [SEAL.]

The foregoing bond for costs is satisfactory as to form, amount and the sufficiency of the surety thereon.

ALEX. SIMPSON,
Attorney of Deft. in Error.

Approved:
MAHLON PITNEY,
Associate Justice of the Supreme Court of the United States.

369 STATE OF NEW JERSEY,
County of Hudson, City of Jersey City, ss:

On this 5th day of August, 1915, before me, the subscriber, an Attorney at Law duly commissioned and sworn, personally came M. O'Leary who, being by me duly sworn, on his oath, saith; that he is the Res. Ass't Sec'y of the National Surety Company of the State of New York, and that he resides in the City of Jersey City that he knows Frank W. Stucky, Resident Vice-President of the National Surety Company, and he knows too, the corporate seal of the said Company; that the seal affixed to the foregoing instrument is such corporate seal; and it was affixed by the said R. V. P. and the said instrument signed by the said R. V. P. as R. V. P. of said Company, attested by deponent as R. A. S. by order of the Board of Directors of said Company in deponent's presence as the voluntary act and deed of said Company, that said Company has duly complied with all the requirements of Chapter 134 of the Laws of the State of New Jersey of the year 1902; that the good avai-able assets of the Company exceed its liabilities, as such liabilities are ascertained in the manner provided in said Chapter; that the National Surety Company is duly incorporated under the laws of the State of New York; and is authorized by the laws of that State and under its charter to become surety on bonds and obligations such as are mentioned in said Chapter; and has *no* deposit with the Superintendent of Insurance of the State of New York, good securities worth at par and at market value at least Two Hundred Thousand Dollars ($200,000) held for the security of its obligations and has a fully paid up, safely invested, and unimpaired capital of Two Million

Dollars; and said Company has appointed the Commissioner
370 of Banking and Insurance of New Jersey and his successor in office as its true and lawful Attorney in the State of New Jersey, upon whom process of Law can be served, and has filed in the office of the Commissioner of Banking and Insurance, a written instrument duly signed and sealed, certifying such appointment, together with the residence and office of such Attorney, within the State of New Jersey; and that the following is a true copy of a By-Law duly adopted by the Board of Directors of the said National Surety Company on the 6th day of February, 1912, at a regular Meeting, to wit:

Article XIII.

Section 1. Signatures required.—All bonds, recognizances, or contracts of indemnity, policies of insurance, and all other writings obligatory in the nature thereof, shall be signed by the President, a Vice-President, a Resident Vice-President, or Attorney-in-Fact, and shall have the seal of the Company affixed thereto, duly attested by the Secretary, an Assistant Secretary, or Resident Assistant Secretary. All Vice-Presidents and Resident Vice-Presidents shall each have authority to sign such instruments, whether the President be absent or incapacitated, or not, and the Assistant Secretaries and Resident Assistant Secretaries shall each have authority to seal and attest such instruments, whether the Secretary be absent or incapacitated or not; and the Attorneys-in-Fact shall each have authority, in the discretion of such Attorneys-in-Fact, to affix to such instruments an impression of the Company's seal, whether the Secretary be absent or incapacitated, or not, or to attach the individual seal of the Attorney-in-Fact thereto, or to use the scroll of the Attorney-in-Fact or a wafer, wax, or other similar adhesive substance affixed thereto or a seal of paper or other similar substance affixed thereto by
371 by mucilage, or other adhesive substance, or use the word "seal" or the letters "L. S." opposite the signature of such Atorneys-in-Fact, as the case may be.

M. O'LEARY,
Resident Assistant Secretary.

Sworn and subscribed in the City of Jersey City in the County of Hudson and State of N. J. this 5th day of August, A. D. 1915, before me an Attorney at Law duly commissioned and sworn.

JULIUS J. SEIDEN,
Attorney at Law of N. J.

[Endorsed:] 3199. Supreme Court of the United States. James Tonsellito, Plaintiff, Defendant in Error, vs. New York Central & Hudson River Railroad Company, Defendant, Plaintiff in Error. On Writ of Error. Bond for Costs. Vredenburgh, Wall & Carey, Attorneys, 1 Exchange Place, Jersey City, N. J. Filed Aug. 1, 1915. Thomas F. Martin, Clerk.

372 Supreme Court of the United States.

JAMES TONSELLITO, Defendant in Error,
vs.
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Plaintiff in Error.

On Writ of Error.

Assignments of Error.

To the Honorable the Justices of the Supreme Court of the United States:

And now comes The New York Central and Hudson River Railroad Company, the plaintiff in error, and makes and files this, its assignment of errors:

There is manifest error in the record and proceedings herein:

1. Because the Court of Errors and Appeals in the last resort in all causes in the State of New Jersey, erred in affirming the refusal of the Circuit Court of the County of Hudson to grant a nonsuit against the plaintiff at the close of his case.

2. Because said Court of Errors and Appeals erred in affirming the refusal of the said Circuit Court, at the close of the whole case, to direct a verdict in favor of the defendant and against the plaintiff.

3. Because the said Court of Errors and Appeals erred in affirming the refusal of the said Circuit Court to find as a matter of law, that at the time of the alleged injury to Michael Tonsellito, the plaintiff's infant son, said Michael Tonsellito, and defendant were
373 not engaged in interstate commerce, within the provisions of the Federal Employers' Liability Act (35 Stat. at large, 65, Chap. 149 U. S. Comp. Stat. Supp. 11, p. 1322).

4. Because said Court of Errors and Appeals erred in affirming the action of said Circuit Court in submitting to the jury for determination the question of whether or not said Michael Tonsellito, plaintiff's infant son, and defendant, were engaged in interstate commerce, within the provisions of said Federal Employers' Liability Act, at the time of the alleged injury to said Michael Tonsellito, plaintiff's infant son.

5. Because said Court of Errors and Appeals erred in affirming the action of the said Circuit Court in overruling the question propounded by defendant's attorney to the witness James Tonsellito, as follows:

"Q. How late did he work that day?"

6. Because said Court of Errors and Appeals erred in affirming the refusal of said Circuit Court to charge the jury, at the request of the defendant, as follows:

"If the roadbed of the defendants at the place and time of the accident was similar in construction to the similar types of roadbed of other standard railroads in the locality, such as the Lehigh Valley Railroad, The Delaware, Lackawanna & Western Railroad and The

Pennsylvania Railroad Companies, and there was no greater distance from the roadbed itself to the top of the rails at the place and time of the accident than on such similar types of railroad, then no negligence can be attributed to defendant because of such distance then existing at such time and place of the accident."

7. Because said Court of Errors and Appeals erred in affirming the refusal of said Circuit Court to charge the jury, at the defendant's request, as follows:

"Plaintiff, Michael Tonsellito's damages in this case are
374 limited to legal compensation for his pain and suffering, the testimony being undisputed that plaintiff was not emancipated at the time of his alleged injury, and there being no proof in the case of any interference with plaintiff's earning capacity in the future because of said injury."

8. Because said Court of Errors and Appeals erred in affirming the refusal of said Circuit Court to charge the jury at defendant's request, as follows:

"If the jury believe that the condition of the defendant's roadbed at the time and place of the alleged injury to plaintiff, Michael Tonsellito, occurred (even though defective in the sense of the statute under which this action is brought, which of course is denied by defendant) was as plain and obvious to the said plaintiff as to the defendant and its agents, then plaintiff must be taken to have assumed the risks of his employment in this respect and cannot recover against the defendant on that phase of this action."

9. Because said Court of Errors and Appeals erred in affirming the action of said Circuit Court in ruling that there was evidence of defendant's negligence in the case, which should be submitted to the jury.

10. Because said Circuit Court should have directed a verdict at the close of the whole case, in favor of the defendant and against the plaintiff, on the ground that the clear weight of the evidence showed that the alleged injury to plaintiff's infant son, Michael Tonsellito, complained of by plaintiff, resulted from said Michael Tonsellito's own negligence and not from any negligence of the defendant; and that said Court of Errors and Appeals erred in affirming such action of said Circuit Court in refusing to so direct.

11. That said Circuit Court erred in not directing a verdict at the close of the whole case, in favor of the defendant and against the plaintiff, on the ground that the alleged injury to plaintiff's infant son, Michael Tonsellito, complained of by plaintiff, resulted from a risk of said Michael Tonsellito's employment which he assumed, and not from the negligence of the defendant, complained of by plaintiff; and that said Court of Errors and Appeals erred in affirming said action of said Circuit Court, in refusing to so direct.

375 12. Because said Court of Errors and Appeals erred in affirming the ruling and judgment of the Hudson County Circuit Court that a cause of action existed under the said Statute in favor of plaintiff for the injury to his infant son complained of.

13. Because said judgment of said Court of Errors and Appeals was against said defendant, the present plaintiff in error, whereas it

ould have been rendered in favor of said defendant, the present aintiff in error, which decision is against the title, right, privilege immunity of said defendant, the present plaintiff in error, set up id claimed by it under the statute of the United States, in both id Court of Errors and Appeals and said Circuit Court of the ounty of Hudson.

And the Plaintiff in Error prays that the judgment aforesaid may reversed, annulled and for nothing holden, and that said Court Errors and Appeals be directed to enter a judgment in said cause, versing and annulling the judgment of said Circuit Court of the ounty of Hudson.

VREDENBURGH, WALL & CAREY,
Attorneys of Plaintiff in Error.

Read on Application for writ of error, the 12th day of August, 915.

MAHLON PITNEY,
Associate Justice of the Supreme Court of the United States.

376 & 377 [Endorsed:] 3199. Supreme Court of the United States. James Tonsellito, Deft. in Error, vs. The New York Central and Hudson River Railroad Company, Pl't'ff in Error. On Writ of Error. Assignments of Error. Vredenburgh, Wall & Carey, Attorneys, 1 Exchange Place, Jersey City, N. J. Filed Aug. 14, 1915. Thomas F. Martin, Clerk.

378 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Court of Errors and Appeals in the last resort in all causes of the State of New Jersey, possessors of the record of the proceedings and judgment in an action at law in which James Tonsellito, is plaintiff-appellee, and the New York Central and Hudson River Railroad Company is defendant-appellants, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea in the Court of Errors and Appeals of the State of New Jersey, wherein final judgment upon return from the Circuit Court of the County of Hudson, in the State of New Jersey, was rendered on the eighteenth day of June, 1915, before you or some of you, said Court of Errors and Appeals being the highest court of law and equity of the said State of New Jersey in which a decision could be had in the action at law between James Tonsellito, plaintiff-appellee, and The New York Central and Hudson River Railroad Company, defendant-appellant, (wherein was drawn in question certain acts of the said parties which would or would not constitute interstate commerce, and the decision was in favor of such acts constituting interstate commerce and against a right, privilege or immunity especially set up and claimed therein by said plaintiff

in error under a statute of the United States), a manifest
379 error hath happened to the great damage of The New York Central and Hudson River Railroad Company, as by its complaint appears. We being willing that that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that then, under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, in the said Supreme Court, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error *which* of right according to the constitution, laws, and customs of the United States should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, the twelfth day of August in the year of our Lord one thousand nine hundred and fifteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Allowed by
MAHLON PITNEY,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] 3199. Supreme Court of the United States. James Tonsellito, Plaintiff, Defendant in Error, vs. The New York Central and Hudson River Railroad Company, Defendant, Plaintiff in Error. Writ of Error. Returnable September 11, 1915. Filed Aug. 14, 1915. Thomas F. Martin, Clerk. Vredenburgh, Wall & Carey, Attorneys for Plaintiff in Error, No. 1 Exchange Place, Jersey City, N. J.

380 To the Honorable the Supreme Court of the United States:

JAMES TONSELLITO, Plaintiff, Defendant in Error,
vs.
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Defendant, Plaintiff in Error.

On Writ of Error.

Prayer for Reversal.

And now comes The New York Central and Hudson River Railroad Company, plaintiff in error, and prays for a reversal of the judgment of the Court of Errors and Appeals of the State of New Jersey, and the judgment entered in the Circuit Court, Hudson County in said State, in the action brought by the above defendant in error against the above named plaintiff in error; and it also pra

that the order of said Court of Errors and Appeals entered in the office of the Clerk of said Court on the eighteenth day of June, 1915, ordering that the judgment of the said Circuit Court be in all things affirmed, and that the records and proceedings be remitted to said Circuit Court to be proceeded with in accordance with said order and judgment and the practice of said Court of Errors and Appeals, be reversed, as well as the judgment of said Circuit Court entered by the Clerk of said Court on the fourth day of November, A. D. 1914.

VREDENBURGH, WALL & CAREY,
Attorneys of Plaintiff in Error.

No. 1 Exchange Place, Jersey City, N. J.

[Endorsed:] 3199. Supreme Court of the United States. James Tonsellito, Plaintiff, Defendant in Error, vs. The New York Central and Hudson River Railroad Company, Defendant, Plaintiff in Error. On Writ of Error. Prayer for Reversal. Vredenburgh, Wall & Carey, Attorneys for Plaintiff, No. 1 Exchange Place, Jersey City, N. J. Filed Aug. 14, 1915. Thomas F. Martin, Clerk.

381 UNITED STATES OF AMERICA, *ss:*

To James Tonsellito, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, at the City of Washington, within thirty days from the date hereof, pursuant of a writ of error filed in the office of the Clerk of the Court of Errors and Appeals in the last resort in all causes, of the State of New Jersey, wherein the New York Central and Hudson River Railroad Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Mahlon Pitney, Associate Justice of the Supreme Court of the United States, this twelfth day of August in the year of our Lord, one thousand nine hundred and fifteen.

MAHLON PITNEY,
Associate Justice of the Supreme Court of the United States.

381½ [Endorsed:] 3199. Supreme Court of the United States. James Tonsellito, Defendant in Error, vs. The New York Central and Hudson River Railroad Company, Plaintiff in Error. On Writ of Error. Citation. Vredenburgh, Wall & Carey, Attorneys of Plaintiff in Error, No. 1 Exchange Place, Jersey City, N. J. Copy received of within citation acknowledged this 16 day of August, 1915. A. W. Simpson, Att'y, etc., Attorney of Defendant in Error. Filed Aug. 16, 1915. Thomas E. Martin, Clerk.

382 STATE OF NEW JERSEY.

[Vignette.]

Department of State.

JAMES TONSELLITO, Respondent,
vs.
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

I, Thomas F. Martin, Secretary of State of the State of New Jersey, and ex-officio Clerk of the Court of Errors and Appeals in the last resort in all causes, do hereby certify that on the Sixteenth day of August, A. D. Nineteen hundred and fifteen, a copy of the foregoing Citation was duly lodged in my office in Trenton, in the State of New Jersey.

In testimony whereof, I have hereunto set my hand and affixed the Official Seal of said Court at Trenton, this Twenty-sixth day of August, A. D. 1915.

[Seal of the Secretary of the State of New Jersey.]

THOMAS F. MARTIN,
Secretary of State.

383 STATE OF NEW JERSEY.

[Vignette.]

Department of State.

I, Thomas F. Martin, Secretary of State of the State of New Jersey, and ex-officio Clerk of the Court of Errors and Appeals in the last resort in all causes, do hereby certify that there was lodged with me as such Clerk, on August 16th, 1915, in the matter of James Tonsellito, Respondent, vs. The New York Central and Hudson River Railroad Company, Appellant,

1. The original Bond of which a copy is herein set forth.
2. Two copies of Writ of Error as herein set forth, one to file in my office.
3. Original Assignment of Errors.
4. Prayer for Reversal.
5. Citation.
6. Petition for Writ of Error.

In testimony whereof, I have hereunto set my hand and affixed the Official Seal of said Court at Trenton, this Twenty-sixth day of August, A. D. 1915.

[Seal of the Secretary of the State of New Jersey.]

THOMAS F. MARTIN,
Secretary of State.

384 STATE OF NEW JERSEY.

[Vignette.]

Department of State.

I, Thomas F. Martin, Secretary of State of the State of New Jersey, and ex-officio Clerk of the Court of Errors and Appeals in the last resort in all causes, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings, in the case of James Tonsellito, Respondent, vs. The New York Central and Hudson River Railroad Company, Appellant; and also the opinion of the Court rendered therein, as the same now appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the Official Seal of said Court at Trenton, this Twenty-sixth day of August, A. D. 1915.

[Seal of the Secretary of the State of New Jersey.]

THOMAS F. MARTIN,
Secretary of State.

385 STATE OF NEW JERSEY.

[Vignette.]

Department of State.

JAMES TONSELLITO, Respondent,
vs.
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Appellant.

In obedience to the commands of the within Writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record of the proceedings in the within entitled cause, with all things concerning the same.

In testimony whereof, I have hereunto set my hand and affixed the Official Seal of said Court at Trenton, this Twenty-sixth day of August, A. D. 1915.

[Seal of the Secretary of the State of New Jersey.]

THOMAS F. MARTIN,
Secretary of State.

386 Supreme Court of the United States.

JAMES TONSELLITO, Plaintiff, Defendant in Error,
vs.
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Defendant, Plaintiff in Error.

On Writ of Error from U. S. Supreme Court to the N. J. Court of Errors and Appeals.

Stipulation.

It is stipulated by and between the attorneys for the respective parties hereto that the printed State of the Case used on appeal in the Court of Errors and Appeals of New Jersey, in the above cause, may be used by the Clerk of said Court of Errors and Appeals in making return to the Writ of Error from the Supreme Court of the United States in above cause, in so far as the records, pleadings, exhibits and other proceedings in said cause are contained therein.

August 30, 1915.

ALBERT C. WALL,
Attorney for Plaintiff in Error.
ALEX. SIMPSON,
Attorney for Defendant in Error.

387 [Endorsed:] 3199. Supreme Court of the United States. 625/24,908. James Tonsellito, Plaintiff, Defendant in Error, vs. The New York Central and Hudson River Railroad Company, Defendant, Plaintiff in Error. On Writ of Error from U. S. Supreme Court to the N. J. Court of Errors and Appeals. Stipulation. Vredenburgh, Wall & Carey, Attorneys, 1 Exchange Place, Jersey City, N. J. Filed Sep. 2, 1915. Thomas F. Martin, Clerk.

388 [Endorsed:] File No. 24,908. Supreme Court U. S., October term, 1915. Term No. 625. The New York Central & Hudson River R. R. Co., Pl'ff in Error, vs. James Tonsellito. Stipulation as to record to be sent up by Clerk of Court of Errors and Appeals. Filed October 11, 1915.

389 Supreme Court of the United States.

JAMES TONSELLITO, Defendant-in-Error,
vs.
THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
Plaintiff-in-Error.

On Writ of Error.

Statement.

To the Honorable the Supreme Court of the United States:

The plaintiff-in-error states that it intends to rely upon all the errors set forth in its Assignment of Errors. The parts of the record which it thinks necessary for the consideration thereof, are:

(1) Writ of Error from the Supreme Court of the United States.
(2) Petition for writ of error.
(3) Assignment of errors.
(4) Prayer for reversal.
(5) Bond.
(6) Citation.
(7) Notice of appeal from Hudson Circuit Court.
(8) Grounds of appeal.
(9) Complaint.
(10) Amendment to complaint.
(11) Answer.
(12) Reply.
(13) Judgment of Hudson Circuit Court.
(14) Certificate of Judge of Hudson Circuit Court.
(15) Testimony.
(16) Motion for non-suit.
(17) Motion to direct verdict.
(18) Judge's charge in Hudson Circuit.
(19) State of the case.
(20) Exhibits P-1 to P-4 inclusive.
(21) Exhibits D-1 to D-8, inclusive.
(22) Opinion of the Court of Errors and Appeals.
(23) Check list.
(24) Judgment of Court of Errors and Appeals.

Dated October 15, 1915.

ALBERT C. WALL,
Attorney for Plaintiff in Error.

390 [Endorsed:] 625/24,908. Supreme Court of the United States. James Tonsellito, Defendant in Error, vs. The New York Central & Hudson River Railroad Company, Plaintiff in Error. On Writ of Error. Statement. Service of a copy of the within Statement is hereby acknowledged this — day of ——, 1915. Copy received Oct. 16, 1915. Alex. Simpson, Att'y Def't in Error. Vredenburgh, Wall & Carey, Attorneys, 1 Exchange Place, Jersey City, N. J.

391 [Endorsed:] File No. 24,908. Supreme Court U. S., October term, 1915. Term No. 625. The New York Central & Hudson River R. R. Co., Pl'ff in Error, vs. James Tonsellito. Statement of errors to be relied upon and designation by plaintiff in error of parts of record to be printed, and proof of service of same. Filed October 20, 1915.

Endorsed on cover: File No. 24,908. New Jersey Court of Errors and Appeals. Term No. 240. The New York Central & Hudson River Railroad Company, plaintiff in error, vs. James Tonsellito. Filed September 9th, 1915. File No. 24,908.

Office Supreme Court, U. S.
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JAMES D. MAHER
CLERK

Brief of Plaintiff in Error.

Supreme Court of the United States.

October Term, 1916.

No. 240.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,

Plaintiff in Error,

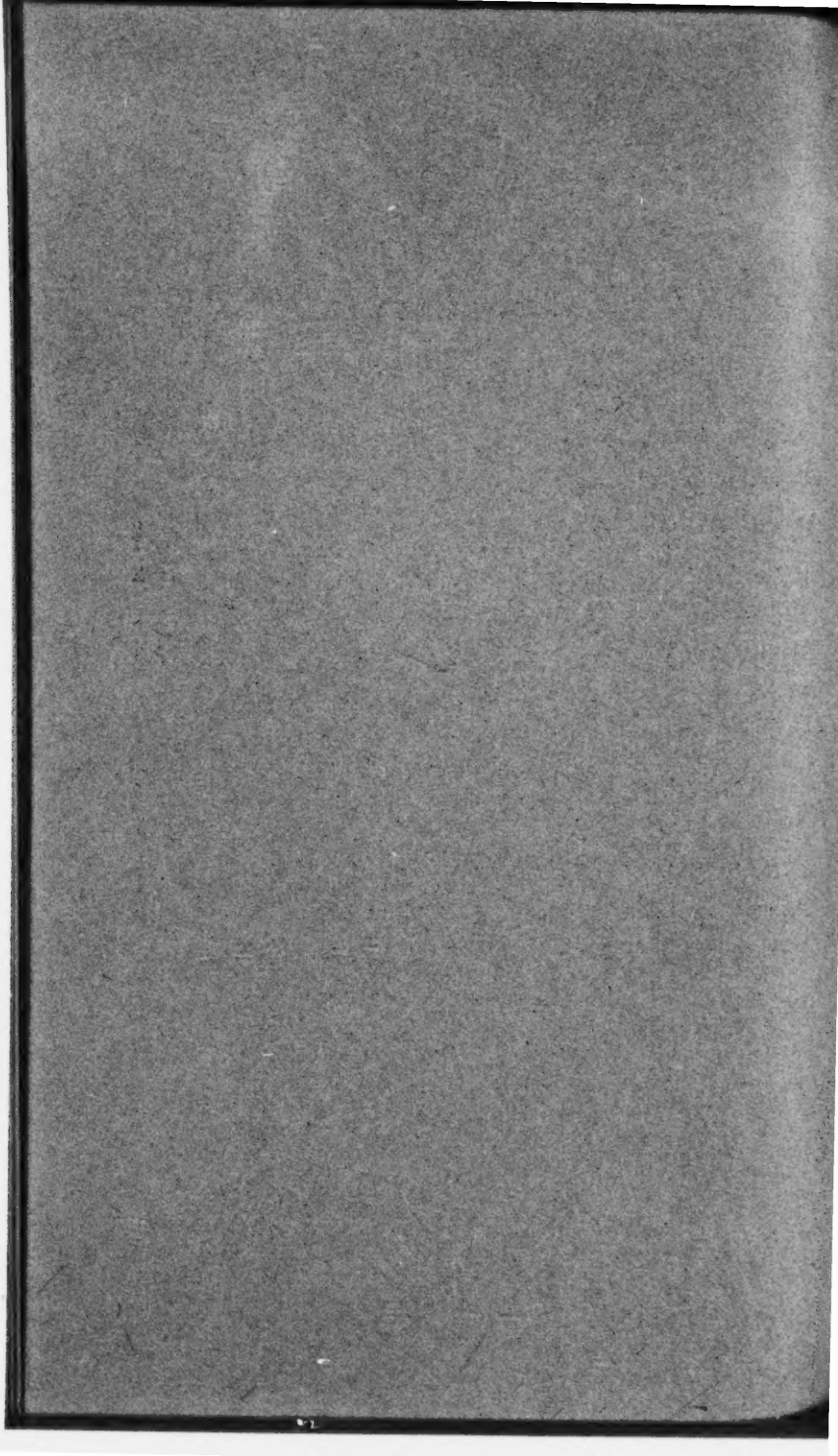
vs.

JAMES TONSELLITO,

Defendant in Error.

IN ERROR TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY

John A. Hartpence,
ALBERT C. WALL,
Attorney and of Counsel with Plaintiff in Error.



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Supreme Court of the United States.

OCTOBER TERM, 1916. No. 240.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
Plaintiff in Error,

vs.

JAMES TONSELLITO,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

I.

Statement of Case.

This is a proceeding on writ of error to the New Jersey Court of Errors and Appeals (which is the highest Court in New Jersey having jurisdiction of this cause), to review the judgment of that Court affirming the judgment of the Circuit Court of Hudson County, New Jersey, rendered in favor of the plaintiff (the present defendant in error), and against the defendant (the present plaintiff in error), for $1000. damages and $50.12 costs on November 14, 1914 (Record of Case No. 239, October Term, 1916, p. 15).

This case was tried with the case of The New York Central & Hudson River Railroad Company, Plaintiff in Error, against Michael Tonsellito, an Infant, who sues, etc. (No. 239, October Term, 1916), the two having been consolidated at the trial (Record No. 239, p. 16). The present case was brought by James Tonsellito, the defendant in error (hereinafter referred to as the plaintiff),

against The New York Central & Hudson River Railroad Company, the plaintiff in error (hereinafter referred to as the defendant), to recover damages for medical expenses for, and loss of services of, his minor son, Michael Tonsellito, resulting from injuries received in the accident which forms the basis of Michael's suit (No. 239, October Term, 1916). The father's suit is based also upon the Federal Employers' Liability Act, but he seeks to recover upon the common law right of the parent growing out of the injury to the minor child (Record No. 239, pp. 13, 14).

The facts and the questions involved, with one exception, are the same as in the case No. 239, inasmuch as primarily the father is not entitled to recover if the son is not.

Separate records, however, have been perfected on appeal to the Court of Errors and Appeals of New Jersey, and now on writ of error to this Court (See Records in Cases Nos. 239 and 240, October Term, 1916).

II.

Specification of Errors.

The assignments of error are found on pages 7-9 of the Record in Case No. 240.

But in the case of the father there is an additional assignment of error relied upon, namely:

> "12.—Because said Court of Errors and Appeals erred in affirming the ruling and judgment of the Hudson County Circuit Court that a cause of action existed under the said statute in favor of plaintiff for the injury to his infant son complained of."

Objection was also made to the Trial Court's charge that the father was entitled to recover if they found a verdict in favor of the son (Record No. 239, pp. 218, 221), and appropriate motions for non-suit (Record No. 239,

pp. 87-89), and for directed verdict for defendant (Record No. 239, pp. 209-211) were made, and were refused by the Court; and this action of the Circuit Court was affirmed by the Court of Errors and Appeals, as in the case of the son (Record No. 239, pp. 235-239; Record No. 240, p. 1).

III.

Brief of the Argument.

It is respectfully submitted that there can be no recovery in consequence of injuries inflicted on or suffered by an employe engaged in the inter-state commerce of his employer railroad under the Federal Act except under the statute itself; and that if it does not give a right of recovery, there is no remedy.

The Court of Errors and Appeals in its opinion (Record No. 239, pp. 238, 239), held that the intent of the Federal Act to exclude rights fixed by the common law was not clearly expressed, and hence sustained the Circuit Court in its rulings touching the right of the father to recover.

Reported in 94 Atl. Rep. 804.

See also

Nelson v. *Ill. Cent. R. R. Co.*, 155 N. W. Rep. (Iowa) 169, where a like result was reached.

But *contra*, in

Flanders v. *Ga. S. & F. Ry. Co.*, 67 So. Rep. (Fla.) 68.

We contend, however, that the Federal Act supersedes all former rights of action within the field that it covers, whether by statute or at common law, and that recourse must be had to the Act itself for the declaration of the right, if it exists. No right being given by that act to the

parent of a minor employe except in the case of death, no right exists in the parent in an action based upon the Federal Statute where injury alone results to the minor employe.

Seaboard Air Line v. *Horton*, 233 U. S. 492; 58 L. Ed. 1062;
Simpson v. *Shepard*, 230 U. S. 352; 57 L. Ed. 1511;
St. Louis &c. R. R. Co. v. *Craft*, 237 U. S. 648; 59 L. Ed. 1160;
So. Ry. Co. v. *Commission etc.*, 236 U. S. 439; 59 L. E. 661;
Toledo etc. R. R. Co. v. *Slavin*, 236 U. S. 454; 59 L. Ed. 671;
St. Louis R. R. Co. v. *McWhirter*, 229 U. S. 265; 57 L. Ed. 1179;
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St. L. & S. F. Ry. Co. v. *Seale*, 229 U. S. 156; 57 L. Ed. 1129;
Am. R. R. Co. v. *Birch*, 224 U. S. 547; 56 L. Ed. 879;
Garrett v. *L. & N. R. R. Co.*, 235 U. S. 308; 59 L. Ed. 242;
Mich. Cent. R. R. Co. v. *Vreeland*, 227 U. S. 59; 57 L. Ed. 417;
Am. R. R. Co. v. *Didricksen*, 227 U. S. 145; 57 L. Ed. 456;
Gulf etc. R. R. Co. v. *McGinnis*, 228 U. S. 173; 57 L. Ed. 785;
St. L. etc. Ry. Co. v. *Hesterly*, 228 U. S. 702; 57 L. Ed. 1031;
Thornton's "Federal Employers' Liability Act" (3rd Ed.) p. 34, secs. 19, 21, and notes.

Complete compensation is provided to the injured employe, and if he be a minor, the parent would doubtless

be entitled to that portion of the recovery flowing from the interference with earning power during minority. To allow the father also to recover in a separate action for loss of services of the minor, would be to give him double compensation. This cannot be the intention of Congress in enacting the Federal statute involved.

IV.

The judgment in favor of plaintiff in No. 240, October Term, 1916, should therefore be reversed, set aside and for nothing holden, for the reasons urged in the main brief in No. 239, and upon the further ground discussed in the present brief.

Respectfully submitted,

ALBERT C. WALL,

of Counsel with Plaintiff in Error.

Office Supreme Court, U. S.
FILED
JAN 27 1917
JAMES D. MAHER
Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1916
No. 240

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY

Plaintiff in Error

vs.

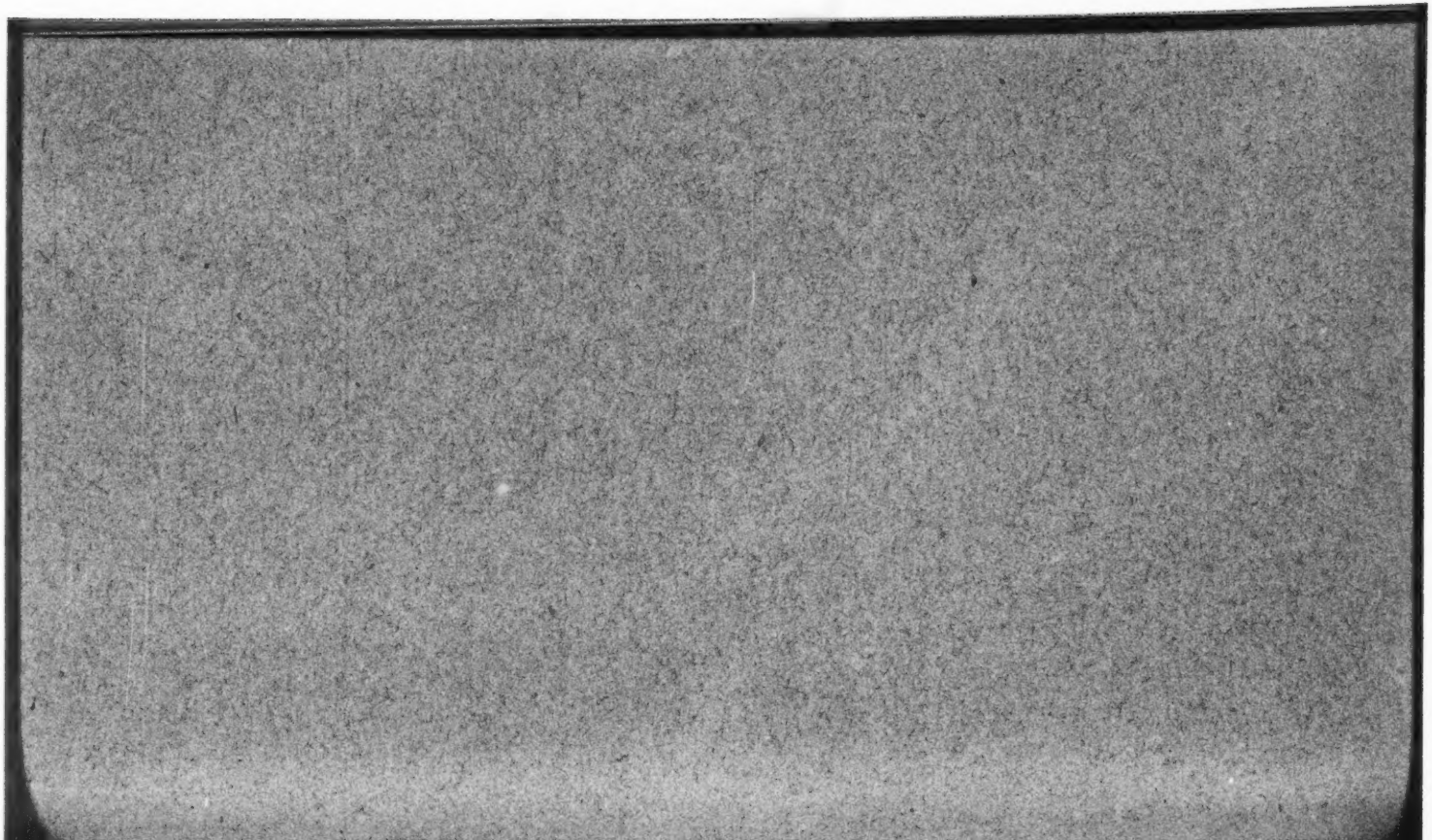
JAMES TONSELLITO

Defendant in Error

Brief of Defendant in Error

ALEXANDER SIMPSON
Attorney for Defendant in Error

THE ARTHUR H. CRIST CO., Cooperstown, N. Y.
New York City Office, 220 Broadway



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Supreme Court of the United States

OCTOBER TERM, 1916

No. 240

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Plaintiff-in-Error, vs. JAMES TONSELLITO, Defendant-in-Error.	Error to the Court of Errors and Appeals of the State of New Jersey.

BRIEF OF DEFENDANT-IN-ERROR

Statement of Facts

The facts in this case are the same as in No. 239, except that this was an action by the father for the loss of services of his son. It is based on the common law negligence of the defendant and so dealt with by the Court of Errors and Appeals of the State of New Jersey.

The contention of the plaintiff-in-error is that the Acts of 1908 and 1910 under which suit for the son was brought, eliminate any common law action on the part of the father for damages.

Brief of the Argument

The recovery in this case was had by the father irrespective of this statute for the loss of services of his minor son. The action was not predicated upon the Act of Congress.

The Court of Appeals of New Jersey in deciding on this appeal said:

> "We do not construe the Federal Act as repealing, either expressly or impliedly, the father's right of action as it existed at common law. It purports to deal only with cases involving the death of the employee and in the absence of an intent clearly expressed or necessarily implied that Congress intended to take away by this corrective or remedial act, the legal status of third parties as fixed by the immemorial rules of the common law, we must assume that such legal rights do subsist unimpaired. The rule of construction is 'That an affirmative statute giving a new right, does not of itself and of necessity destroy a previously existing right.' *Broom's Legal Maxim,* p. 508; *O'Flarherty vs. McCowdall,* 6 H. L. cases, 137.
>
> "So it is held the statutes which take away, change or diminish fundamental rights, statutory remedies for rights unknown to the common law and statutes which provide new and extraordinary remedies must be strictly construed both as to the cases mentioned within their terms and as to methods to be pursued. *36 Cyc.,* p. 1188, and cases cited."

This opinion of the Court of Appeals of New Jersey will be found in the 94th Atlantic Reporter, p. 805, entitled *Tonsellito vs. New York Central & Hudson River Railroad.*

The argument now is that this Court will say that because the Federal statute gave the minor an action in his own behalf, it by that very act took away something with which it did not deal—the action of the father under the common law, for injuries to his minor son. It is not denied that if Congress attempted to legislate on this subject, connected with interstate commerce, the legislation would be exclusive, but it has not attempted to legislate upon liability of interstate carriers to parents of persons

injured. It is simply legislation on the subject of liability to the person injured, or at his death, to his representative and beneficiary, but it has not attempted to legislate upon the subject of liability of carriers by railroad engaged in interstate commerce to the parents of minors employed by them. Therefore, the state law is not superseded. It is not until Congress legislates that its powers are paramount and exclusive.

See *Missouri Pr. Co. v. Cassel,* 224 U. S., 541, in which case it is held that unless Congress acted in the matter there was no repugnancy to the commerce clause of the Federal Constitution in the Nebraska statute governing contributory negligence of an employee of a railway engaged in interstate commerce.

The question here, it is submitted, is what is the construction of this statute? Does it legislate on the subject of recovery by a parent for minors? The rule for the construction of such statute as decided by the Court of Appeals of New Jersey is a strict construction and if that is made in this case, what can be read into the statute that would deny the recovery by a father for the loss of services of a minor child?

The cases cited in the brief of the plaintiff-in-error all go to the fact as to what the statute included, not what it excluded. The Trial Court did not charge, nor was there any exception to that portion of the charge, page 218 in the record, that because Michael could recover, his father must recover; but the charge was much more favorable to the defendant than it was entitled to, that if Michael could not recover under this act his father could not recover, and conversely charged that if Michael did recover, then his father might recover; not that he must recover, but that he might recover. In other words the charge was in favor of the defendant, charging that unless Michael could recover, his father could not recover, but charging that if Michael did recover, his father might also recover; not founding the liability upon the act, but stating that there was a permissive recovery on the part of the father, if the son did recover.

There was no exception taken to this part of the charge but the error heard here is the failure of the Court to direct a verdict against the father, because he could not recover under the Federal statute. The exception was to the language of the Court. There was no clear exception pointing out that the plaintiff-in-error thought that this put a recovery in favor of James, the father, upon the statute, but simply to the language of the Court. If this language of the Court could be construed so as to be without error, that should be done.

The plaintiff-in-error did not request the Trial Court to charge the jury that the plaintiff, James Tonsellito, has no action under the Federal Act, but did or did not have an action under the common law, but requested the charge that he had no action of any kind; and under the complaint which sets up simply the facts an action was embraced under common law. There was no direct appeal to the statute made in the complaint. Therefore, if the defendant-in-error, James Tonsellito, had any action, there was no error of the Trial Court in allowing that action to proceed to trial if it was not founded specifically upon the Federal statute. That it was the duty of the plaintiff-in-error to point out to the Court by specific objection any ambiguity in the language, see *Gerhardt vs. Boettger,* 75 N. J. Law, 916. The language of the Court was:

> "If, however, you find that your verdict should be for Michael, then you may find for the father."

This was not mandatory, but permissive. If ambiguous, the plaintiff-in-error should have requested a clearer charge.

Chess vs. Vockroth, 75 N. J. L., 665.

It is respectfully submitted that the judgment below should be affirmed.

ALEX. SIMPSON,
Attorney for Defendant-in-Error.